IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 160 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ZONAL MANAGER

Versus

AKHILBHAI B MEHTA

Appearance:

1. Civil Revision Application No. 160 of 2000

MR AS VAKIL for Petitioners No. 1-2

MR LR PUJARI for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 20/12/2001

ORAL JUDGEMENT

#. This Revision Application is directed against an order passed by the City Civil Court on 12.1.2000 below the petitioners' application for leave to defend which is Ex.14 in Summary Civil Suit No.5114/1998 by which the

City Civil Court directed the petitioner to deposit a sum of Rs.12,000/- and thereby granted conditional leave to defend the suit.

#. The facts goes to suggest that the respondent herein a former employee of the petitioner Bank retired on 28.2.1997. On retirement the respondent claimed Earned Leave Encashment to the extent of 156 days. As per the record of the Bank the respondent was paid the encashment of Earned Leave to the extent of 132 days and, therefore, the question arise for the encashment of Earned Leave of 24 days. All other retirement benefits to the tune of Rs.72,179/- including leave encashment to the extent of 132 days was paid to the respondent, therefore a suit came to be filed by the respondent for the recovery of Earned leave encashment of the disputed amount of 24 days an amount of Rs.12,000/- was claimed for leave encashment of 24 days, interest thereon at the rate of 24% per annum from 1.3.1997 to the date of the suit amounting to Rs.6500/- also claimed by the respondent and the interest upon Rs.72,179/- for 132 days Earned Leaves from 1.3.1997 to the date of suit perhaps at the rate of 24% per annum was claimed to the tune of Rs.25,248.44 ps. amounting in all to Rs.33,748.44 ps. A summons for the judgment came to be issued by the City Civil Court in Summary Suit No.5114/1998 to which leave to defend affidavit-cum-written statement came to be filed by the present petitioner - State Bank of Saurashtra wherein it was stated that though there was 156 days leaves at the credit of the employee concerned but since the employee had enjoyed more sick leaves then entitlement as mentioned in the Written Statement and commuting such sick leaves, 24 Earned Leaves were required to be deducted out of the 156 days leaves standing at the credit of the employee and, therefore, encashment of 132 days Earned Leaves was allowed. It was also contended that the employee concerned served at various branches where his service record was maintained and in para-7 an account of sick leave enjoyed by the present respondent are given in detail which comes to 318 days in all commuting the same it comes to 636 days and hence it was disputed that the employee concerned - the original plaintiff was not entitled to 24 days Earned Leave as claimed by him.

#. After hearing the parties, the learned City Civil Judge vide his impugned order was pleased to grant conditional leave to the present petitioner on deposit of Rs.12,000/- within three weeks and filing of Written Statement within two months and the said order is impugned in this Revision Application.

#. Learned advocate Mr.A.S.Vakil, for the petitioner and learned advocate Mr.N.R.Pujari, for the respondent were heard at length.

#. At the very outset the learned advocate Mr.Vakil raised the preliminary point that whether the suit can be treated as a Summary Suit. It was argued that the dispute which has arisen between the parties is not falling within ambit of Order-37 Rule-1 Sub-Clause-2 and, therefore, the trial Court has committed a jurisdictional error in passing the impugned order. It was further stated that in the trial Court the respondent did not file any reply to the application to leave to defend and controverted the facts mentioned in leave to defend application. It was further stated that as per the record of the Bank though there were 156 days leave at the credit of the employee but since he enjoyed sick leaves more then entitlement the said sick leaves were required to be adjusted against the Earned Leave after commuting the same and, hence, the encashment to the extent of 132 days leave was allowed. It was urged that this fact is not controverted by filing rejoinder on affidavit by the plaintiff. On this aspect the learned advocate for the petitioner has cited a decision of this Court in the matter of Bharat Oil Depot vs. Pari Prafulchandra Kantilal & Ors, as reported in 1983 GLH 222 wherein this Hon'ble Court observed that in absence of any affidavit-in-rejoinder filed controverting the statements made by the defendant in his affidavit in support of his application for leave to defend, it was the duty of the Court to give to the defendant unconditional leave. The learned advocate also relied upon a decision of this Court in the matter of Sarasvatiben Lallubhai Parikh vs. Kantilal Purshottam Patel, as reported in 1964 GLR 152, wherein it is observed that when the facts stated in leave to defend application is not controverted by the plaintiff by affidavit-in-rejoinder it was the duty of the Court to give unconditional leave to defend to the defendant. The reason being that, triable issues clearly emerge on a perusal of the affidavit-in-reply filed by the defendants on the summons for judgment. It was also contended that the suit is not restricted only to 24 Earned Leave Encashment but the interest at the rate of 24% for the amount earlier paid and for the amount of 24 days Encashment Earned Leave has also been included in the suit amount. It was stated that this itself is triable issue and unconditional leave to defend ought to have been given to the defendant - present petitioner and on this ground it was urged that the Revision Application be

allowed.

#. On the other side learned advocate Mr.L.R.Pujari contended that vide reply para-5 of the leave to defendant application it is admitted on behalf of the petitioner that there were 156 leaves at the credit of the original plaintiff - employee. It was urged that the defendant Bank did not produce any leave account in the Court. It was urged that the dispute was only about the encashment of 24 days leave at the credit of the employee and, therefore, in view of Order-37 Rule 1 of the Civil Procedure Code and in view of Rule-142 of the City Civil Courts' Act the suit was maintainable for liquidated amount. Mr.Pujari therefore urged that in view of Order-37 of Civil Procedure Code and in view of Rule-142 of the Rule of City Civil Courts' Act learned City Civil Judge had jurisdiction to grant conditional leave and within this jurisdiction a conditional leave order was passed which is not subject to an interference in revisional jurisdiction because the learned trial Judge did not commit any jurisdictional error. It was urged that therefore this Revision Application is required to be dismissed.

#. Having heard both the learned advocates and having gone through the facts of the case and record it will have to be decided whether the present dispute as has been raised by the plaintiff is falling within the ambit of Order-37 Rule-1 of the Civil Procedure Code. It was urged that the suit is filed for liquidated amount of 24 days Earned Leave and therefore it falls within the ambit of Order-37. Perusing Order-37 Rule-1 Sub Section-2 it is clear that the dispute falls in none of the Sub Clause of Sub Rule-2 of Rule-1 of Order-37. It is not the suit for recovery of liquidated amount but the amount of interest at the rate of 24% has also been sought to be recovered by the plaintiff respondent. The case is clearly covered by the unreported decision of this Court as reported in the matter of National Textile Corporation Ahmedabad vs. Shri Rajendra Sankalchand and Parikh, as reported in 1982 GLH (Uj.)7 wherein the Court in unequivocal terms ruled that in order to succeed in getting the amount of interest the opponent - plaintiff will have to prove his case by evidence and this cannot be permitted in a Summary Suit and, therefore, in view of the claim of interest amount made by the plaintiff in the suit the suit cannot be said to be Summary Suit and consequently not triable as Summary Suit. Claiming of the amount in the present case at the rate of 24% takes out the dispute of the scope of Summary Suit and therefore the learned Judge committed a jurisdictional

error to grant conditional leave. Not only that, neither the dispute can be termed as liquidated demand as envisaged by the Order-37 Rule 1(2) but the claim of interest is also a triable issue and takes the suit out of the ambit of the Summary Suit. On this ground alone this Revision Application is required to be allowed, irrespective of the fact that even if it is Summary Suit there were triable issues.

#. In this view of the matter, since the suit filed by the plaintiff is not falling within ambit of Summary Suit the order passed by the learned trial Judge to defend the suit on condition is without jurisdiction and erroneous and is required to be set aside. In this view of the matter, this Revision Application is allowed. The order impugned passed by the City Civil Court for issuing summons for judgment which is dated 17.12.1991 is set aside and consequently the order impugned which is dated 12.1.2000 granting conditional leave to defend is also set aside. Rule is made absolute. No order as to costs.

#. However, if so requested by the plaintiff respondent before the learned trial Judge the learned trial Judge shall consider the expeditious disposal of the suit in view of the peculiar circumstances of the case and expedite the disposal of the suit so far as possible.

(J. R. VORA, J.)

kks